Supreme Court, U.S.
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In The

Supreme Court of the United States

H. Richard Austin,
Petitioner Pro Se

vs.

Downs, Rachlin & Martin,
Harold Eaton, Esq.,
Gregory Clayton, Esq.,
Douglas G. Peterson & Associates,
Stephen Houghton, Douglas G. Peterson & Associates,
Jimmy Pau, Mercury Research Laboratory,
Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

- Whether the determination at a trial that expert (scientific) evidence is "valid" (*Daubert v. Merrell Dow*, 509 U.S. 579 (1993)) collaterally estops an opposing party from subsequently challenging the resulting judgment as well as such evidence on the basis of late-discovered fraud? (And doesn't this interpretation of *Daubert* conflict with FRCP 60(b) and the 5th and 14th Amendments of the U.S. Constitution - "due process?")

- Whether a conspiracy to utilize fraudulent, expert evidence (scientific) in a legal proceeding constitutes a "fraud on the court," especially since a district court functions as a 'gate-keeper' regarding the admission of such evidence? (*Hazel-Atlas Glass Co. v. Hartford-Empire Co.* 322 U.S. 238 (1943))

- Whether the conspiracy involving respondents to falsify scientific evidence of arson successfully manipulated *Daubert's* standards, as well as FRE 702, in order to thwart "due process" and obtain an unconscionable judgment?

- Whether experts and attorneys who present as "valid" fraudulent evidence, including scientific, in a legal proceeding should be subject to mandatory, judicial penalties, including a permanent ban from federal court for the dishonest experts?

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OPINIONS BELOW

The District of Vermont dismissed Petitioner Austin's action (03-cv-204) in response to respondents' motions to dismiss (FRCP 12(b)(6) and entered judgment on November 3, 2003 - Appendix No. 1. The Court of Appeals for the Second Circuit affirmed on collateral estoppel grounds (03-9264 - November, 4, 2004) - Appendix No.2.

JURISDICTION

This appeal comes before the Supreme Court pursuant to 28 USC 1254 and is taken from the order of the Court of Appeals for the Second Circuit (November 4, 2004).

CONSTITUTIONAL PROVISIONS INVOLVED

The 5th and 14th Amendments of the U.S. Constitution - "due process"

SUBJECT MATTER

This long-standing dispute concerns a conspiracy involving a national insurance company, attorneys, experts and others, who falsified scientific evidence of arson. The conspiracy, which utilized professionals in several states, commenced only a few days after the fire and long before any dispute arose concerning either the fire or the relevant insurance. The prompt, almost routine way the conspiracy was initiated indicates that at least some of these individuals had considerable experience in this type of fraudulent activity.

The undisputed facts that have emerged over several years demonstrate how easy it is in some situations, including house fires, to falsify expert (scientific) evidence, and also how far some attorneys and experts are willing to go to win a judgment based on such evidence. Unfortunately, expert witness fraud gives a significant advantage to litigants with the capability to perpetrate

such deception that can make a fair trial nearly impossible.

It is the natural inclination of an insured party to rely on the insurance company's expertise to determine a fire's cause - an inquiry that is basically scientific in nature. However, this creates a situation that can invite the type of fraud involved here against which the average homeowner is virtually defenseless. Once such falsified, scientific evidence is in place, it can be very difficult to dispute it effectively after the fact. A fire scene deteriorates rapidly. Typically it is exposed to the elements, and after it has been evaluated, most of the relevant evidence has been affected or no longer exists so it can be meaningfully re-examined. When the fraud has finally been discovered, most or all of what is available has been crafted for the purpose of perpetrating the fraud. In the instant case, the samples of fire debris that allegedly tested positive - the so-called hard evidence of arson - didn't come from the actual scene but instead from an unknown location.

The objective of the scheme engineered by these experienced attorneys and experts, who are now defendants/respondents, was nothing less than to negate completely the legal standards relevant to house fire disputes. This includes the burdens of proof that have developed in state substantive laws over more than a century and also federal procedural law, especially concerning the admission of expert (scientific) evidence (*Daubert v. Merrell Dow*, 509 U.S. 579, 125 L.Ed.2d 469 (1993)).

The fire occurred on November 12, 1993, completely destroying Petitioner Austin's home in Warren, Vermont. The structure and contents were insured by a homeowners policy issued by the Hanover Insurance Company (hereafter referred to as 'Hanover') - a subsidiary of the Allmerica Financial Corporation. The amounts of coverage under the policy had been determined by the company and their agent and approximately equaled the loss. Following the casualty, all terms for indemnification were complied with, including the proofs of loss that establish the financial parameters of a claim and were accepted by Hanover as fair and accurate. Thus the compensatory damages are liquidated. A few weeks after the fire, Hanover was informed that the purpose of the claim was the reconstruction of the dwelling, and a qualified builder

acceptable to the insurer was chosen by the insurer's agent. Over a period of months extensive preparations were made with the builder to commence reconstruction as soon as the weather permitted. Nonetheless, just as the spring building season arrived, Hanover voided the policy on the grounds of arson and refused to permit reconstruction. During the subsequent period of more than ten years, there have been three lawsuits (hereafter referred to as *Austin I, II and III*) initiated sequentially by petitioner in connection with the fire and the substantial loss caused to him.

The first action against Hanover commenced in August 1994 and ended with an adverse judgment (August 1, 1997) after a jury trial devoted almost entirely to the issue of fire causation. During the trial, the insurer did not produce any evidence regarding the essential elements of opportunity and motive. Fraud was not at issue. About a year and a half after trial, however, information was located that demonstrates conclusively the judgment was obtained through a conspiracy involving, among others, the attorneys and expert witnesses representing the insurer. The purpose was to fabricate "scientific" evidence admissible in court that would provide the misleading impression that the subject fire was deliberately set ("incendiary"). Thus, the fraud went to the heart of the insurer's legal case, establishing through devious means the element that has become indispensable (sine qua non) to the so-called arson defense to liability - definitive proof that a fire was in fact deliberately set ("must find...that the fire was of incendiary origin.) *Westchester Fire Insurance Company v. Deuso,* 146 Vt. 424, 426, 505 A.2d 666 (Supreme Ct. - Vermont (1985)).

The cases from across the country cited in *Deuso* indicate that any circumstantial evidence relied upon in this regard must be very strong. Some examples: *Boone v. Royal Indemnity Company,* 460 F.2d 26, 28 (10th Cir. - 1972) - ("Several pounds of explosive substance had been placed in the building ... explosion preceded the fire..."); *Gregory's Continental Coiffures and Boutique v. St. Paul Fire and Marine Insurance,* 536 F.2d 1187, 1188 (7th Cir. - 1976) - ("...five plastic drums in the shampoo room...contained gasoline..."); *Great American Insurance Co. v. K&W Log. Inc.* 591 P.2d 457, 459 (Court of Appeals, Washington, 1979) - ("...600 to

700 pounds of Trojan dynamite had been used...").

To meet this substantial evidentiary burden, the opinion of experts in fire investigation is generally used.[1] Federal evidentiary standards control the admissibility of such evidence including *Daubert v. Merrell Dow.* The conspiracy involved here accomplished the objective of thwarting *Daubert's* standards by cleverly mimicking the techniques employed in the field. The hard evidence that allegedly supported the investigation was the falsified lab tests of material that didn't come from the subject fire site. In this way the participants unlawfully manipulated the situation so anything might be proven regarding the fire's cause that would serve the insurer's objective of avoiding financial liability.

Another aspect of the scheme was the elaborate, ongoing campaign engineered by Hanover's attorneys to undermine the judicial process so it could not function correctly. Thus, this complex fraud also constitutes an overt "fraud on the court" (*Hazel-Atlas Glass v. Hartford-Empire Co.*, 322 US 238, 88 L.Ed. 1250 - 1944). Instead of the expert testimony providing meaningful insight into the subject matter (FRE 702), the direct opposite occurred. The privileges granted to experts to express opinions became an invitation for deception, and the trial turned into a textbook example of how to trick a lay jury regarding a complicated, scientific issue.

PRIOR LITIGATION

The litigation commenced in Missouri state court in mid-1994. The case was then removed to federal court and the venue changed to Vermont (95-cv-170 - *Austin I*). The papers, submitted by the insurer in alleged good faith to the Eastern District of Missouri,

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[1] Although the techniques employed in the field are regarded as scientific in nature, a significant portion of fire investigators have limited, technical training and to qualify as experts rely heavily on experience, including as fire fighters. Thus, there is typically a disparity in the length of educational background in comparison to many other types of experts such as doctors, engineers, accountants, etc..

claimed that the move halfway across the country was essential to the equitable disposition of the dispute. The grounds cited were almost exclusively the fire investigation and related materials, all of which later proved to be a fraud.[2] Thus, from the outset of the litigation, the insurer and its operatives demonstrated a willingness to employ deception directed at the federal court system as well as the opposing party. Discovery commenced in August 1995, extended over a period of 14 months, and was never completed. Following the five-day, jury trial preoccupied almost entirely with the issue of fire causation, the adverse judgment was entered - the trial little more than a cleverly executed dramatic performance based on fake science. Such a performance could have only been perpetrated because of the broad prerogatives granted in federal courts to attorneys ("officers of the court") and testifying experts.

An appeal to the Second Circuit (97-9069) cited various errors (mainly procedural) before and during the trial. The Second Circuit rejected the appeal on November 12, 1998. Subsequently, a petition for a writ of certiorari was also denied. Before the Second Circuit and the Supreme Court, the fire investigation was defended as legitimate and scientific. Thus the fraud was also perpetrated on both courts, including the nation's highest. About one and a half years after the trial, petitioner finally obtained information that demonstrates conclusively the judgment is fraudulent. On that basis, an independent action (FRCP - 60b - savings clause) - (September 2, 1999) was initiated, citing both fraud inter parties and fraud on the court (99-cv-252 - District of Vermont) -

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[2] It was stated to the court: "there are physical forensic samples taken from the fire scene, as well as reports concerning those samples...While it would not be impossible to transport this evidence to St. Louis...such transportation would involve the risk of the samples being lost or otherwise damaged." Defendants' Memorandum in Reply, Oct.31, 1994, p.6. Also, "...transferring such physical evidence would involve great expense..." Defendants' Motion For Change of Venue, Sept. 28, 1994, p.3. This so-called essential evidence that allegedly needed such elaborate protection is, of course, a complete hoax.

(*Austin II*).[3] While not denying the fraud, the insurer responded with a motion to dismiss (12(b)(6)), alleging res judicata on spurious grounds, including that non-existent, post-trial motions had been submitted concerning the fraud. Of note is the fact that not a single word was produced from the trial record that substantiates the claim of res judicata. Typically, res judicata is an affirmative defense to be expressed in a pleading unless the record clearly demonstrates otherwise. No such supporting documentation was provided because it doesn't exist. Nonetheless, the action was dismissed, and an appeal to the Second Circuit (99-9375) was denied by a motion's panel (May 4, 2000) in connection with a motion seeking reduction of an excessive bond granted after the appeal was docketed at the Second Circuit. The denial occurred without briefs being submitted on the fraud issue.

A petition for a writ of certiorari to the U.S. Supreme Court followed, and the insurer responded with a waiver, once again not challenging the facts that document its fraudulent activities. The petition was denied on October 10, 2000. Based on the waiver, two motions for relief were then submitted to the district court, both of which were denied (November 7, 2000). Another appeal was made to the Second Circuit (00-9521), and a clearly erroneous order was issued (July 13, 2001). Employing improperly the abuse of discretion standard, the merits panel failed to conduct the required de novo review and also failed to examine the complaint of the independent action as well as the evidence it contains.

On July 28, 2003, the current action (03-cv-204 - *Austin III*) was filed against the attorneys and experts who had successfully executed the fraud on behalf of their client. The defendants/ respondents answered with Rule 12(b)(6) motions citing both res judicata and collateral estoppel. Another dismissal followed (November 3, 2003) that was recently upheld by the Second Circuit on collateral estoppel grounds (November 4, 2004). Once again the

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[3] The complaint includes extensive documentation (70 pages). The documents referred to in this petition are found there as well as elsewhere in the record, including the appellant's appendix (03-cv-204).

motions to dismiss do not contain any support from the record that substantiates the contention the fraud issue was actually litigated in *Austin I*. In sum, although the dispute has continued over more than a decade, the late-discovered fraud issue has not to date received the benefit of due process.

REVIEW OF THE CASE

1) Investigations Of The Fire Site

Pursuant to a voluntary release provided by petitioner, Hanover conducted the investigation of the site that supposedly would objectively determine the fire's cause. The actual work for the insurer was done by Douglas G. Peterson & Associates, Greenfield, Massachusetts, an engineering firm that investigates fires across the United States. No restrictions were placed on the investigators, who were given unlimited access to the site that was left untouched for almost a month so any necessary, follow-up might be performed. The debris was finally removed when winter weather set in so the foundation could be protected. It should be noted that petitioner designed and personally built most of the house over several years. It contained a number of unique, construction features, including a complex, electrical system with computer and satellite dish components. As a result, he considered it essential to identify the fire's cause prior to reconstruction. To this day, he still considers the woodstove the most likely cause. It served as an alternate or back-up source of heat to a hot-water, oil fired system with multi-zones covering the entire structure that was fifty feet in height. The stove, that was on the ground floor, was connected to a very tall chimney with a strong draft and had previously overheated a number of times, resulting in at least two chimney fires that damaged the internal flue tiles.

Relying on the insurer's commitment to share the results, petitioner did not have his own investigator. This explicit commitment was not kept, and some preliminary information regarding Hanover's supposed "scientific" evidence of arson was only obtained through a court hearing and order in mid-1996, or more than two and a half years after the fire. As a means of

broadening the resources brought to the investigation, petitioner also provided a voluntary, unrestricted release to the Vermont State Police so they could participate in the work at the site. He did so assuming they possessed some specialized expertise that might be of assistance. Their investigation took place on November 15 and 16 and utilized a dog trained to detect hydrocarbon or petroleum-based substances in fire debris. The dog reacted a number of times in the ground-floor, media room that for eight years had been the former garage. In that area, petitioner once kept his cars and worked on various machinery, including a tractor, chain saws, etc. Tests performed at the New York State Crime Lab were all negative, and it has never been determined what the dog might have detected. The officer (Harrington), who performed the police investigation, admitted during his deposition that no one knows what the dog detected. During the trial he stated otherwise. .

The insurers' investigator, George Wilson of Douglas G. Peterson, was present during the police investigation and also worked there by himself on November 24. On that occasion he examined the utility/laundry rooms, the only area on the ground floor not examined by the dog. Wilson's work on the 24th provides the basis for his report that supposedly established by recognized, scientific procedures that the probable cause of the fire was an accelerant being poured in the laundry room. On its face the report appears to be very professional. It utilizes technical terminology in abundance and throughout mimics accepted methodology. In this way, the illusion of scientific objectivity was created. The information that has emerged over several years, however, demonstrates conclusively that the report is nothing more than a cynical fabrication intended to serve the objective of thwarting petitioner's insurance claim.

2) The Experts' Revealing Mistake

While at the site on November 24, George Wilson took numerous photographs and collected eight samples from the utility/laundry room area. This debris was supposedly shipped to the Mercury Research Lab in Cary, North Carolina, where analytical tests were performed on a Hewlett Packard gas

chromatograph/mass spectrometer (GCMS). It is further alleged that two of the eight samples tested positive for an accelerant initially identified as kerosene. Later, this was changed to No.2 fuel oil or home heating oil.

It is now beyond reasonable doubt, however, that the tests were ordered from the lab before Wilson returned to the site on the 24th for the purpose of fabricating a report that would utilize the fake tests. In essence, these tests were intended to provide the hard evidence supporting the falsified opinion of arson that Douglas G. Peterson was being paid handsomely to produce under the guise of scientific inquiry. Apparently, carelessness born of over-confidence caused the scheme to unravel and the truth regarding the insurer's so-called "scientific" evidence to emerge.

The two, allegedly positive tests are dated November 25, 1993, 2:32am (sample #4) and November 25, 1993, 4:00am (sample #6). Such a date/time is generated automatically by the GC/MS at the inception of a test and encrypted along with the rest of the data in binary code (computer language). It cannot be altered later without destroying a significant portion of the test file. The date/time is produced by an internal clock that continues to run automatically even when the computer is turned off because it is supported by a CMOS battery. These batteries are very reliable and long-lasting. In the unlikely event that one failed, any date/time would be lost along with the computer's BIOS (basic in/out system or operational instructions). Hence, the computer would not be able to function correctly when the GCMS was restarted. It would, of course, be impossible not to notice such a situation.[4]

Having spent most of November 24 at the site, Wilson had to

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[4] For further details, excerpts are provided from the sworn statements of Mr. Jay Chrystal, President and Lab Manager of ChemServe, Milford, New Hampshire, an environmental testing lab accredited nationally (Appendix No. 3), and Donald Hesse, a chemist and software engineer from Saint Louis, Missouri (Appendix No.4). Between them, Chrystal and Hesse have over 40 years in the testing field, which includes working with the Hewlett Packard GC/MS equipment that performed the subject tests. Their complete statements are attached to Paper No.14 (9/08/03) in the district court record.

drive back to the offices of Douglas G. Peterson & Associates in Greenfield Massachusetts (about five hours), sort and package the samples and ship them to Cary, North Carolina, which is about one-thousand miles away. After reaching the Mercury Research Lab, they had to be unpacked and undergo extensive preparation. This last step is an overnight process. All of this, including transport over such a long distance, would have to take place in only a few hours so the tests could be performed in the early morning of November 25. Obviously this is impossible. Hanover's experts have not been able to provide a scientifically plausible explanation for the date/time discrepancy contained in the lab tests that allegedly support George Wilson's opinion of arson. Instead, on the sworn record they have made overtly false statements on the subject that contradict basic, scientific facts regarding the design of a GC/MS as well as the lab's own written documents.

3) Trial Testimony Of Concealed Witness (Lab Director)

At the trial Jimmy Pau, technical director of the Mercury Lab, who for several months could not be located, provided deliberately false testimony with the assistance of attorney Gregory Clayton in order to deceive the jury about the tests. According to Pau, the samples didn't reach the lab until November 30 and the tests conducted on December 1. He attempted to explain the date/time discrepancy by alleging that the computer in the GC/MS had been turned off for six, straight days because of electrical problems in the Cary, North Carolina area. Allegedly this stopped the internal clock that generates the date/time. Thus, when the computer was turned back on so the tests could be conducted, there was the discrepancy of six days. As Pau stated falsely under oath: "You have to set the date and the time...after you turn it off, you have to reset it...you need to reset the clock <u>every time you run that</u>." This explanation is obviously false and contradicts the way the clock in a GC/MS's computer functions, including the fact it is supported by a battery. Since there is this reserve source of power, it isn't necessary "every time" to reset the clock which continues to run on its own. Furthermore, Pau testified that when the two tests took place, lab personnel didn't notice that the computer generated an

erroneous date/time six days before the date when the tests were supposedly performed. [5]

Equally revealing is the fact that Pau's pivotal testimony is disproved by the lab's own written correspondence related to the analytical tests. The letter of November 30, 1993 to Douglas G. Peterson refers to the samples identified by the dog, and the letter of December 2, 1993, also addressed to Peterson, to the samples supposedly acquired by Wilson on November 24. In these documents, which review the test procedures employed, reference is made to the lab's "quality assurance program," that was performed immediately prior to testing so the GC/MS would function correctly. As stated: "A quality assurance program was incorporated into the standard analytical operating procedure. The QA program consists of a daily auto-tune of the mass spectrometer and a standard calibration run on the GC/MS system. This program ensures the proper calibration of both GC and MS instrument." (emphasis added). Since this "auto-tune" program was being conducted on a "daily" basis, the computer that controls the equipment could not have been turned off for six, straight days. Furthermore, it is totally implausible that after just conducting a quality assurance review of the GC/MS prior to testing, the operator didn't notice that the computer that controls the equipment wasn't functioning correctly. Based only on this written evidence from the lab itself, there is no other possibility except that Pau's explanation of the date-time discrepancy given under oath before the jury is deliberately false and the tests a fraud.

It should be noted that personnel at the Mercury lab subsequently inserted a date at the top of the chromatograph (test diagram) in an area where -unlike the body of the test results - information, such as a title or file designation, can be added later. At the trial, Pau admitted that this date was put there after the tests were performed. This obvious attempt to obscure the date/time

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[5] An electronic clock, such as that in a GC/MS's computer, is not like a mechanical clock that continues to display the time when it stopped running. In the event the source of power stopped, any date/time would be lost along with the computer's operational instructions (BIOS) so it wouldn't function correctly.

discrepancy, however, does not alter the fact that all available information clearly demonstrates that the tests are a fraud.

The date/time discrepancy was the result of an unanticipated change in George Wilson's schedule. Originally he returned to the site on November 22. However, petitioner would not allow him to proceed without assurance that the results of his work would be shared. Hence, he had to come back on the 24th, causing the discrepancy, which ultimately resulted in the fraud being detected.

4) Knowledge Of Accidental Causation

The events surrounding the fraudulent fire investigation indicate knowledge by Hanover, George Wilson and other participants in the scheme that the fire was accidental. Since the tests were already arranged before Wilson returned to the site on the 24th, it must have been concluded that there was no need to wait and test any additional samples he might acquire on that day. Otherwise, before going to all the trouble of setting up the fake tests, the conspirators would have waited for Wilson to review the important area of the house not previously examined. When the earlier work was done on November 15 and 16 (when the dog was there), Wilson, and probably others, must have detected something that indicated the fire was accidental. As previously stated, petitioner believes that the woodstove overheated causing a serious chimney fire. Unfortunately, the woodstove, that weighed over 500 pounds and was rendered useless by the heat of the fire, mysteriously disappeared from the site and has never been found. To remove the stove would have required a truck and three, strong men. There is no plausible reason that such a useless, cumbersome object would have suddenly disappeared except to prevent the stove from being used as evidence to determine the fire's cause.

5) Concealing The Scheme

After the litigation commenced, attorneys Harold Eaton of Eaton and Hayes, Woodstock Vermont, and then Gregory Clayton of Downs, Rachlin and Martin, Burlington, Vermont, and later Aten, Clayton and Eaton, knowingly conducted an illegal campaign to thwart discovery. This included generating in increments

additional, falsified evidence in order at all times to stay a step ahead of the inquiry. During the period, Hanover never willingly complied with any discovery request until a motion of some kind was before the court. The insurer did not voluntarily produce for deposition the experts connected to its own fire investigation. Afterward, neither Wilson or Pau would sign their depositions - something that is not typical of truthful, scientific experts. Next, Pau abruptly disappeared "somewhere abroad" so his deposition could not be completed. He absented himself just when the transcript of the initial portion of his deposition became available. When petitioner contacted lab personnel trying to ascertain where Pau was located, Attorney Clayton repeatedly threatened sanctions, making clear his determination to prevent further contact with this important, material witness. Since Pau did not reappear until discovery was closed, petitioner was unable to finish questioning him about the falsified tests.

After Pau finally resurfaced, he cooperated with Attorney Clayton to produce a forged document falsely attributed to the prestigious American Society of Testing and Materials. This includes a cover letter from Clayton (November 25, 1996) endorsing the document as authentic. The immediate purpose of this deceptive act was to nullify an important court order regarding relevant information promised by Pau at his initial deposition. However, this spurious document was only produced after discovery ended so Pau could not be questioned about this subject as well. Thus, in the ongoing effort to protect the fraud, Hanover and its surrogates, including the attorneys, were even willing to engage in gross forgery regarding one of the most important, scientific organizations (ASTM) in the country.

6) The Experts' Attempt To Scuttle Their Own Project

Of significance is the fact that while discovery was in progress, Wilson and the other experts tried intermittently to undermine their own opinions so they would be excluded by the court. Having become aware of the date/time discrepancy, they obviously acted in this fashion out of concern for potential adverse consequences related to being participants in a serious, scientific fraud. Based on

this dispute, it is apparent that when faced with a fraudulent project gone awry, experts such as these view themselves as having what might be regarded as an escape route. If the fraud shows signs of not holding together, they merely discredit their opinions and derail the project after extracting from it whatever gain can be realized.

As a result, at his deposition (August 6, 1996) Wilson explicitly repudiated his own fire investigation that had been employed by Hanover to prevent reconstruction of the insured dwelling. The focus of the report is a so-called "accelerant pour pattern" that was allegedly found on the laundry room floor. A rendering of the pattern was the report's principal display. Nonetheless, during his deposition, Wilson stated under oath that "I don't believe I indicated where an accelerant was actually poured...How much was poured or where it was actually physically poured, I do not know.."

In his supposedly authoritative report Wilson created a detailed drawing of the alleged, accelerant pour pattern, took numerous photographs of the pattern, and also wrote about the area where an accelerant was allegedly poured - a finding supposedly verified by lab tests on a GC/MS. Nonetheless, he later stated under oath that he had no idea where any accelerant could have been poured. This is not normal behavior by anyone, especially an experienced, highly paid expert. Either Wilson took leave of his senses, or he was trying to derail the project out of concern for adverse circumstances. With discovery thwarted, however, Wilson reappeared at the trial and once again reversed himself, stating that in retrospect he really did find what he stated in his report. Impressed by his demeanor, experience and the skillful way his bogus testimony was presented by the trial lawyer, the jury chose to ignore completely his prior, sworn statements in which he explicitly repudiated his own findings.

The explanation that the experts were trying to scuttle the project is supported by the fact that at various times the other experts committed their own contradictory, self-defeating acts that further undermined the alleged finding of accelerant usage. Twice the lab changed its opinion about the identity of the substance allegedly found in the debris. This was done in such a manner that it really wasn't possible to determine with any certainty what had

been detected. Initially the substance allegedly found was identified as kerosene. This was finally changed to home heating oil, an entirely different petroleum derivative.

In that connection, both Jimmy Pau and Stephen Houghton, the director of fire investigation services at Douglas G. Peterson, repeatedly demonstrated an inability to classify properly these two substances - the type of mistake that a first-year chemistry student wouldn't make. Houghton initiated this overt error in his letter (January 11, 1994) to Attorney Harold Eaton regarding the initial, falsified tests. By then, the date/time discrepancy had no doubt been discovered, and the decision made to muddy the waters so a means of exiting the project would be available.[6]

The inaccuracy of the tests and the experts' inability to classify properly the relevant petroleum substances were also drawn to the jurors' attention during cross-examination. Once again, they were sufficiently impressed by the experts' credentials and the clever presentation that they ignored these highly relevant contradictions as well. Instead, they accepted without question the experts' renewed assertions of accelerant usage that conflict with their previous, sworn statements.

7) Fabricating Additional, Fraudulent Evidence

While exhibiting by their conduct an obvious concern for adverse consequences, the experts nonetheless continued to participate in the scheme and thereby earn additional sums of money for their "scientific" research. In this fashion, they assumed what amounts to a double role as intermittently they cooperated further with the attorneys in the ongoing effort to prop up the fraud.

With total disregard for the legitimate purposes of discovery, Hanover and its attorneys utilized the period not only to hide the

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[6] Houghton's statement appears as a footnote: "Kerosene is a generic term for liquid fuels which include jet fuel, lamp oil, and No.2 heating oil." However, No. 2 fuel oil is not a subcategory of kerosene. Kerosene is a "light" petroleum distillate, and no. 2 fuel oil an "intermediate" distillate. They are reviewed in entirely separate "specifications" issued by the American Society of Testing and Materials.

fraud but also to falsify additional evidence in the ongoing effort to salvage the scheme. This involved the direct participation of Stephen Houghton, who previously remained in the background supervising George Wilson. (Apparently at this point, Wilson was no longer willing to participate in further "scientific" research.) Houghton traveled to the site in Warren and supposedly obtained a liquid sample from the underground fuel tank on the property.[7] Another test was performed at the Mercury Lab, and not surprisingly, it allegedly established with appropriate scientific validation that the accelerant that was never actually found came from the tank.

The letter of June 21, 1996 from the Mercury Lab makes clear how closely the attorneys were now monitoring the activities of the experts so no further mistakes would be made. Previously, when the original, falsified tests were produced, the letter from the Mercury Lab (November 30, 1993), regarding the samples identified by the dog, and the letter (December 2, 1993), regarding the samples allegedly acquired by Wilson, were both addressed to Stephen Houghton. In turn, he wrote to Attorney Harold Eaton about the matter. However, after the dating problem arose, all the correspondence from the lab goes directly to Clayton, who was exerting a direct control over the production of the fraudulent evidence. This continues with the letter dated March 6, 1997 from the lab (also addressed to Clayton) that concerns the next step in the campaign to prop up the scheme.

With the spurious conclusion established that the alleged accelerant originated from the underground, fuel tank, Attorney Clayton with the help of the experts engineered the production of a final piece of false evidence in the ongoing effort to reinstate the credibility of the initial, falsified tests. This fakery conveniently made its appearance just as the case was placed on the trial calendar. It consisted of some sort of paper stuffed in a can

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[7] For almost three years, the tank had been unattended, and when the sample was allegedly removed, a house was being built on the property by the new owner. As a result, the tank was in the middle of a construction project.

partially filled with fuel oil. The item was produced by Officer David Harrington of the Vermont State Police more than three and one-half years after the fire. Harrington suddenly produced the mysterious substance in the tin can in spite of the fact that during his deposition on July 2, 1996 (almost a year before Austin was actually informed), neither he or Attorney Clayton disclosed the existence of this allegedly relevant evidence in response to repeated, emphatic questions [8] about any relevant, "physical" items "in the possession" of the Vermont State Police.

At the pretrial conference on July 1, 1997, Attorney Clayton in a direct verbal exchange deliberately deceived the trial judge, who was new to the case, regarding the timing when petitioner was actually informed about the substance in the tin can. Clayton's explicit statement to the court: "The moment we got that report back from the lab we sent this to Mr. Austin..." However, compare this statement to letter from the lab dated March 6, 1997, in which the results of the test on the substance in the can were first reported to Clayton, and his cover letter dated May 21, 1997, when the information was finally sent to petitioner, or almost three months later than Clayton alleged falsely to the judge in open court. Also note the letter to Clayton dated May 19, 1997 belatedly generated by Stephen Houghton, in which the attempt is made to give the false impression that Clayton has just learned about the test results. However, in explicit language the letter from the Mercury Lab (March 6) demonstrates otherwise. If evidence is legitimate,

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[8] Q. (Austin) "...physical items from the scene. What haven't we covered, Mr. Harrington, anything...

A. (Harrington) Okay. So physical items in my possession?

Q. Anything... Have you disclosed everything that you took from the fire scene?

A. Everything, yes, that's correct...

Q. So you feel confident that any evidence the police might feel is in any way relevant to this case has been disclosed to me? You say there's nothing from the fire scene...Mr. Clayton...You feel confident that as far as everything you know about Mr. Harrington has explained everything to me?

A. (Clayton) I am not aware of additional evidence that the State Police has... that we've not allude to today...I believe everything has been covered here..."

especially scientific evidence, it is rarely concealed in this manner (so it cannot be scrutinized) and then snuck in just before trial by employing deceptive statements to a judge.

Allegedly the item that appeared so suddenly was the newspaper (copy of the Wall Street Journal) found after the fire on the front lawn near a stump petitioner was cutting up with a chainsaw. The real newspaper, which originally was in his wheelbarrow, had been lying there for about a month. At the trial, petitioner for the first time saw the item, which was not what had been on the lawn. Someone had stuffed a wad of paper in a gallon can of foul-smelling oil, which ultimately ended up in the jury room. Presumably, the objective was to provide corroboration of arson through something totally independent of the falsified tests that might still be regarded as suspect. The acrid smell from the can would have pervaded the jury room, producing a confusing, psychological impression on its members already prejudiced by days of falsified "expert" testimony orchestrated by Attorney Clayton. Essentially, this was the proverbial *coup de grace* of what amounted to a protracted, dramatic performance. In all, four experts (Pau, Wilson, Houghton and Harrington) perjured themselves regarding the fraudulent evidence in order to legitimatize it in the eyes of a jury with no prior knowledge of this difficult subject. To augment the smelly substance in the can, the senses of the jury members were further impacted by impressive, displays (three-feet in length), which allegedly depicted in vivid color the pour pattern that George Wilson previously stated under oath that he never found. All of this commenced with a lengthy dissertation by Officer Harrington on the "science" of fire investigation.[9]

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[9] During his testimony, Harrington admitted that all along he possessed Douglas G. Peterson's internal file that of necessity would have contained all the information relevant to the fraudulent fire investigation and lab tests.

Q. "As part of your investigation , you got a copy of the Peterson file?

A. (Harrington) Yes.

Q. And this was a file that George Wilson helped prepare?

A. ...it was his file."

During the five days of the trial, repeated emphasis was given by Attorney Clayton to the experts' credentials and experience, implying that their opinions could be trusted. The trial in *Austin I* demonstrates how a well-orchestrated performance by experienced experts and a trial lawyer skilled at perpetrating fake science can mislead a lay jury, convincing its members to overlook obvious inconsistencies, including prior, sworn statements in which the experts call into question, or even repudiate, their own, supposedly authoritative opinions.

A final point regarding the trial in *Austin I* should be noted. During a significant portion of the pretrial, the district judge (Sessions), who originally handled the case, was ill and ultimately experienced a serious heart attack. As a result, the voluminous file swollen by countless discovery motions occasioned by respondents' manipulative tactics, was repeatedly transferred and belatedly ended up in the hands of the trial judge shortly before the trial. This unfortunate situation presented Hanover and its operatives with an invaluable opportunity to perpetrate an elaborate evidentiary fraud that they utilized to the fullest.

REASONS FOR GRANTING THE WRIT

1. In *Austin I*, respondents perpetrated a nearly perfect, scientific fraud by manipulating *Daubert's* requirements as well as FRE 702.

This dispute demonstrates how easily the scientific method, including testing procedures, can be manipulated, especially by applying them to "data" or materials that are bogus. As a result, the procedures might be performed correctly and on the surface appear valid while the results are totally spurious. It is now known that the substance tested at the Mercury Research Lab on November 25 didn't come from the actual fire site. Depending on the situation or the nature of the evidence, dishonest experts often have a considerable advantage perpetrating such fraud that corrupts completely the litigation process. Petitioner wasn't informed that the fire that destroyed his home was allegedly "incendiary" until

after the winter weather set in and the site cleared. At that time, all the relevant evidence was gone except what had been selected to perpetrate the fraud. It took more than two years in court to obtain some specifics regarding the insurer's allegedly "valid" investigation. At that point, the experts were the only source of information regarding their own fraud.

If the unexpected change in George Wilson's schedule hadn't occurred, resulting in the date/time discrepancy encrypted in the test results, the fraudulent nature of the insurer's investigation probably never would have been uncovered. In spite of the mistake that early on threatened the scheme, however, respondents and their client were so confident in their ability to fake the relevant science that they doggedly persisted for years trying to maintain the "illusion" of scientific validity. Although the experts created what they regarded as an escape route for themselves, it is apparent that the group, especially the attorneys, had so little regard for the methods of science as well as the judicial process that nothing was going to deter them. As a result, a significant amount of the supposedly valid evidence presented to the jury was falsified during discovery - a period dedicated to bringing forth the facts.

2. Respondents' conspiracy also constitutes an overt "fraud on the court".

This large-scale conspiracy included the insurer client, fire investigation firm, testing lab, various attorneys and others, all of whom colluded for years to prevent a fair resolution of the controversy. During that period, a variety of deceptions were also directed at the federal court system. Expert witness fraud such as this can be appropriately regarded as a distinct species of "fraud on the court," especially because the district court functions as a 'gate-keeper' for the admission of such evidence.

The activities of the attorneys and experts in *Austin I* constitute a fraud on the court according to any currently recognized definition of the term. In the 1946 revised version of Rule 60b, relief for the first time was provided from a judgment on the grounds of such fraud. While incorporating *Hazel-Atlas Glass v. Hartford-*

Empire, 322 US 238, 88 L.Ed.1250 (1944) into the Rules, the advisory committee did not specifically define the concept or state how it should be applied. To this day, questions persist as to its full scope. In *Toscano v. C.I.R.*, 441 F.2d 930, 933-4 (1971), the Ninth Circuit stated the point: ("The distinction between "fraud" on the one hand and "fraud on the court" on the other is by no means clear, and most attempts to state it seem to us to be merely compilations of words that do not clarify...") In *In Re Genesys Data Technologies*, 204 F.3d 124, 130 (2000), the Fourth Circuit went even further referring to the term as ("that otherwise nebulous concept.")

Such fraud has been variously described: ("...fraud [that] harms the integrity of the judicial process.") - *In Re Intermagnetics America*, 926 F.2d 912, 917 (9th.Cir.-1991) emphasis added; or fraud ("...directed to the judicial machinery...") - *Bulloch v. United States,* 721 F.2d 713, 718 (10th.Cir.-1983) emphasis added. The circuits have often dealt with the issue by copying the Hazel-Atlas model to one degree or another:

> "In Hazel-Atlas the Supreme Court set aside a twelve-year old judgment on account of new evidence of a 'deliberately planned and carefully executed scheme to defraud not only the Patent Office but a Circuit Court of Appeals' in order to obtain a patent. 322 US at 245-6...Proof of a scheme to defraud together with the complicity of the offending party's lawyers in Hazel-Atlas was, in the Court's judgment, conclusive evidence of fraud on the court." *Gleason v. Jandruko,* 860 F.2d 556, 559 (2d.Cir.- 1988).

3. The erroneous decisions in the courts below are based on a misinterpretation of *Daubert* and also contravene FRCP 60(b)(3) and FRCP 60(b) - savings clause.

The recent orders of the district and appellate courts justify the dismissal of the current action on the basis of a misinterpretation of the concept of "validity" that is central to the *Daubert v. Merrell Dow* precedent. As a result, the district court concludes incorrectly that the acceptance of scientific evidence as valid during a trial

necessarily means that the issue of whether it is fraudulent has been examined and rejected. The District of Vermont states:

> "In *Austin I*, Plaintiff raised the issue of the validity of the scientific evidence used by Hanover; Plaintiff did not convince the fact-finder that the evidence was fabricated; he had ample opportunity to litigate the issue in *Austin I*; and the conclusion that the evidence was not fabricated was essential for finding in favor of Hanover. Thus, collateral estoppel prohibits Plaintiff from re-challenging the validity of scientific evidence that he challenged in *Austin I*." "Ruling on Defendants' Motions To Dismiss" (November 3, 2003), p. 5 (emphasis added). (Appendix, 1a)

In its order, the Second Circuit employed a similarly erroneous interpretation but expressed it in a somewhat different manner:

> "There is considerable overlap between the issues previously litigated and resolved in the prior actions and those which Austin attempts to raise in the instant case. At issue in *Austin I* and in *Austin v. Hanover Ins. Co.*, 14 Fed. Appx. 109 (2d Cir. 2001)(unpublished opinion), was the validity of the scientific evidence that was presented to the jury. Austin seeks to relitigate the validity of that evidence by styling the issues as fraud and fabrication of evidence. Austin had a full and fair opportunity to litigate these issues in *Austin I*, and the jury's determination that the evidence was not fabricated was necessary to support a finding in favor of the insurance companies. Thus, under the doctrine of non-mutual collateral estoppel, Austin was properly precluded from bringing the instant action." "Summary Order" (November 4, 2004), p.3 (emphasis added). (Appendix, 6a)

In *Daubert,* the Supreme Court replaced the long-standing Frye "general acceptance" standard with an analytical approach emphasizing the scientific method. The Court stated:

> - "...[the inquiry] entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid.. Ordinarily, a key question to be answered in determining whether a theory or technique is scientific knowledge ...will be whether it can be (and has

been) tested... 'The statements constituting a scientific explanation must be capable of empirical test.'..." *Daubert,* 125 L.Ed.469, 482.

"...scientists typically distinguish between 'validity' (does the principle support what it purports to show?) and 'reliability' (does application of the principle produce consistent results?).... our reference here is to *evidentiary* reliability - that is, trustworthiness... In a case involving scientific evidence, *evidentiary reliability* will be based upon *scientific validity.*" at p.481, fn.9.

In *Daubert*, the Supreme Court does not formally require that the possibility of fraud be eliminated in order to establish the validity of the proffered evidence. As noted, both the district and appellate courts base their decisions on a contrary interpretation. However, the question of whether or not evidence is valid (ie. rests on 'good grounds' - *Daubert* at 481) can be approached in a variety of ways without actually considering whether it is a fraud. Furthermore, such a determination can only be made on the basis of the information that is available. During the trial, petitioner scrutinized the fire investigation and tests by questioning the professionalism and competency of the experts who produced the evidence. At the time the assumption was that the evidence probably was not fraudulent.

Expert fraud, particularly scientific, is insidious and difficult to uncover. The purpose of *Daubert* would be thwarted if the possibility of fraud is permanently foreclosed by an initial determination of validity on any relevant grounds. Thus the injured party would be prevented unfairly from subsequently utilizing late-discovered evidence. In essence, such a misinterpretation would render inoperative both FRCP 60(b) and FRCP 60(b) - savings clause, which are designed to address fraud discovered after a trial.

4. The erroneous decisions of both courts also misapply collateral estoppel and therefore violate procedural due process as well as numerous Supreme Court decisions.

The misuse of collateral estoppel results in obvious injustice by

preventing a well-supported case (such as late-discovered fraud) from being pursued. In addition, it violates the fundamental, constitutional right of due process. Collateral estoppel, or "issue preclusion," only blocks an action if it is clearly established by the record that the issue was previously litigated "fully and fairly." In its erroneous order, the district court cites *United States v. Hussein*, 178 F.3d 125, 129 (2d.Cir.-1999) and the standards contained therein that justify the use of collateral estoppel: 1) the issues in both proceedings are identical; 2) the issue in the prior proceeding was litigated and decided; 3) there was a full and fair opportunity to litigate in the prior proceeding; 4) the issue previously litigated was necessary to support a valid and final judgment on the merits.

In *Blonder-Tongue Labs. v. University Foundation*, 402 US 313, 28 L. Ed.2d 788, 800 (1971), the Supreme Court emphasized that collateral estoppel violates due process where a party has ("never had a chance to present their evidence...due process prohibits estopping them.") In regard to what constitutes "a full and fair opportunity," the court briefly addressed the subject in *Montana v. United States*, 440 US 147, 164, 59 L.Ed.2d 210, 223, fn. 11 (1979) - ("Redetermination of issues is warranted if there is reason to doubt the quality, extensiveness, or fairness of procedures followed in prior litigation.") The wording of these decisions, which emphasize the actual events during prior litigation as well as the fairness of those events, reflect the appropriate deference federal courts have consistently paid to the right of due process embodied in the 5th and 14th amendments.

A review of the record shows unequivocally that the fraud issue was not been fully and fairly litigated in either *Austin I* or *Austin II*. As the Supreme Court stated in *Sea-Land v. Gaudet*, 414 U.S. 573, 593, 39 L.Ed.2d 9 (1974) - ("The judgment in the prior action operates as an estoppel... only as to those matters in issue or points controverted..."); also *Commissioner v. Sunnen*, 333 U.S. 591, 597-8, 92 L.Ed. 898 (1948) - those matters actually litigated. However, even if the possibility to litigate the fraud issue did exist but was overlooked in *Austin I*, it would have no bearing on the current action. The point is addressed in Moore's Federal Practice 3d:"unlike claim preclusion, issue preclusion does not prohibit a

party from litigating issues that were never argued or decided in the prior proceeding...even though those points might have been tendered and decided at that time" 132.02 [1].

5. Although the litigation has continued for more than a decade, due process regarding respondents' fraud continues to be improperly denied.

As grounds for their spurious motions to dismiss in *Austin III*, respondents rely on misinterpreting one, brief statement in a pretrial memorandum presented by petitioner to the trial court in *Austin I*. This is a sparse defense indeed. Alluding to the date/time discrepancy, the statement raises the question as to whether a mistake occurred at the lab when the subject tests were performed.

> "Whether the mass spectrometer/gas chromatograph tests at the Mercury Research Lab in North Carolina in the early morning of November 25, 1993 were actually performed on samples taken from the Warren fire site on the afternoon of November 24, 1993."

On the basis of that statement alone, which can be interpreted in more than one way, respondents have managed to perpetuate this wasteful litigation. The district court concluded that without additional support from the record the cited statement is sufficient grounds for invoking both res judicata and collateral estoppel to bar the current action. However, it does not refer to fraud. At the trial the questioning of Jimmy Pau examined the discrepancy by inquiring whether a mistake was made during testing.[10]

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[10] Q. (by Austin) "Just let me ask you this, Mr. Pau. Was there any mistake made in your tests?

A. Excuse me?

Q. Any mistake?

A. I don't understand what you mean.

Q. Was there any mistake made in your laboratory regarding the testing of the samples sent to you by Douglas Peterson.

A. No, I don't think so.

Q. You don't think so. Okay..."

Furthermore, the various experts' competency was contested by emphasizing their prior, inconsistent behavior. The possibility was also suggested to the jury that the experts might have confused themselves about a subject that is inherently difficult to interpret.

Nonetheless, respondents' motions to dismiss and briefs in opposition allege repeatedly without support in the record that the fraud issue was actually litigated in *Austin I* and there was a "full and fair opportunity" to do so. Respondents were determined to perpetrate the fraud and make a shambles of the judicial process. They succeeded and have continued to reap the benefit of the deception. Of the methods that can be employed to undermine a court proceeding, there is little they overlooked.

Although the independent action pleading both fraud inter parties and fraud on the court (*Austin II*) contains indisputable, supporting evidence, it was barred nonetheless at both the district and appellate levels. Instead of a misinterpretation of the relevant legal standard ('validity'), the grounds were a misinterpretation of what took place during the trial in *Austin I*. Therefore, the district court in an inscribed order (November 3, 1999) rejected the action outright as "clearly barred by res judicata." Subsequently, a bond was granted at the insurer's request. Petitioner appealed the bond as excessive, and without submissions regarding the fraud issue, the dismissal of the action was upheld in a brief order by a motion's panel responding to a motion for a bond reduction (May 4, 2000 - Appendix No.3). It should be noted that in the order the panel cites as precedent *In Re Teletronics Services, Inc.*, 762 F.2d 185, 190 (2d.Cir.-1985), which quotes the well-known definition of res judicata contained in *Commissioner v. Sunnen*, 333 U.S. 591, 597-8 (1948). Therein, Justice Douglas emphasizes that res judicata does not apply where "fraud or some other factor invalidating the judgment" is present. That, of course, is the issue presented in the independent action. Without any submissions on the subject, it is apparent the motion's panel did know the true nature of the action.

A petition for a writ of certiorari followed, and the insurer responded with a waiver. The petition was denied. Based on the assumed significance of the waiver for the overall case, petitioner

submitted two motions to the district court seeking relief from the dismissal and additionally entry of a judgment. Both orders were denied with one sentence, inscribed orders (November 7, 2000), and another appeal made to the Second Circuit. After submission of briefs and a hearing, a clearly erroneous order was issued (July 12, 2000 - Appendix No.4), in which the court failed to perform the required de novo review. Based on the wording of the order, it is clear that the court never went back in the record beyond the two recently rejected motions based on the waiver. As a result, the abuse of discretion standard is applied improperly, and the independent action and its extensive evidence never examined. This conclusion is based on the fact that repeatedly (three times), the court refers to the document that initiated the action as Austin's "first Rule 60 b motion" (p.2,ln.43; p.3, ln.6, p.3, ln.28). Since the court was unaware that an independent action was involved, it could not have known what it contains or reached a definitive conclusion on the evidence. Furthermore, as precedent for res judicata, the merit's panel cites *St. Pierre v. Dyer*, 208 F.3d. 394, 399 (2d.Cir. 2000), a case that supports the principle that a dismissal does not necessarily extinguish the claims for damages involved. In the cited case, a pro se's complaint was dismissed and subsequently upheld. The pro se, St. Pierre, initiated a follow-up action reasserting the same claims, and another dismissal occurred. However, the reviewing court concluded that ("St. Pierre's claims for damages in *St. Pierre I* were not dismissed on the merits; hence, the jurisdictional dismissal does not bar his assertion of those claims here."), at 401.

In conclusion, the two orders of the Second Circuit in *Austin II* bar cannot be utilized to support the application of collateral estoppel in the current action, because the fraud issue has not to date been given a chance to be "fully and fairly" litigated. Nonetheless, the action has been dismissed improperly on such grounds. At this point, intervention by the Supreme Court is the last, remaining opportunity available to petitioner to obtain justice in connection with the loss of his home.

6.The evidence of respondents' fraud in the well-developed record is incontrovertible. Currently there is no dispute regarding a material fact that is genuine.

It took more than a year after the trial to obtain solid proof that respondents had perpetrated a successful fraud regarding the house fire. During that period, petitioner reviewed the subject with numerous experts in the lab testing and fire investigation fields, including the two, highly qualified experts whose testimony is relied on in this action. Based on respondents' documents as well as the scientific facts, there is no possibility that the subject tests were not falsified as well as the insurer's entire fire investigation.

When the fraud was finally uncovered and the independent action initiated, the attorneys, now respondents, did not submit a responsive pleading in defense of their insurer client. Instead, they entered an unsupported motion to dismiss. Thus they squandered the opportunity to dispute the facts. Similarly, in response to the complaint in *Austin III*, the attorneys and experts, who are now defendants/respondents, once again failed to challenge the facts with a pleading and instead submitted bad faith motions to dismiss unsupported by the record. On both occasions, they did not dispute the facts detailing the fraud because they can't. To do so, they would have to deny their own evidence and the relevant GC/MS technology that establish beyond doubt their fraud.

7. Respondents' conspiracy has caused irreparable harm to petitioner and also undermined the standards of the federal court system.

For more than a decade, petitioner has been victimized by the conspiracy reviewed here. Having managed through fraud to shield their prominent insurer client from liability, respondents have made themselves liable for the harm caused by their actions. The conspiracy can also be viewed as deliberately undermining the federal court system as well, having been directed at two, district courts (E. District of Missouri and District of Vermont), the Second Circuit Court of Appeals and the U.S. Supreme Court.

On the basis of what has been uncovered, it is unlikely that this is an isolated episode in the fire investigation and lab testing fields. While this situation may be somewhat extreme, the facts indicate that the abuse of expert evidence in modern courts is probably more widespread than is thought. Regrettably, the facts also demonstrate how easily what appears to be objective science can be faked. Under typical circumstances, the fraudulent lab tests would have provided the requisite, scientific support for the contrived fire investigation, and the true nature of the fraud never uncovered. As the documentation from the Mercury Lab states, the tests were supposedly performed according to the latest, scientific protocols on up-to-date testing equipment. If a blunder had occurred during the execution of the conspiracy, it would have been very difficult to challenge the tests' validity. Thus, the precision of the scientific method emphasized in *Daubert* is transformed by fraud into a two-edged sword. Instead of establishing a reassuring certainty that assists triers of fact, the relevant science becomes the efficient means of perpetrating deception in courts of law and obtaining unlawful judgments.

It is not an exaggeration that an effective expert perpetrating fraud can pervert a trial completely. Experts bring to a dispute an element of authority that places them in a category far removed from ordinary witnesses. Attorneys and experts, who conspire to falsify scientific and other evidence, undermine the judicial process in a profound way, make fair trials impossible, and cause enormous damage to an opposing party. Such fraud favors well-heeled, dishonest litigants with the requisite resources and connections. Unfortunately, the adversarial system is limited in its ability to remedy such fraud because of the extensive prerogatives granted to experts that can be misused so easily. As a result, sanctions applicable to the perpetrators takes on a distinct importance.[11]

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[11] For experts, the mandatory sanction should be nothing less than the permanent loss of the 'privilege' to produce evidence in federal court. Once an attorney has engaged in the type of conduct documented here, legitimate questions can be raised regarding their suitability to enjoy the 'rights' of an 'officer of the court' either temporarily or permanently. At a court's gate-keeping inquiry, the proof

For the reasons discussed, this dispute warrants review by the Court. If this petition fails, respondents' fraud, including that visited upon the court, will stand along with all the regrettable consequences that have followed. Furthermore, it will do nothing less than convince other home insurers, dishonest experts and attorneys that such highly profitable fraud will succeed, even if mistakes occur along the way. In conclusion, through this action (*Austin III*), petitioner seeks a judgment, the long-overdue, liquidated, compensatory damages (*Cushman v. Kirby*, 536 Atlantic 2d. 550, 554 (Supreme Court - Vermont), and also an opportunity in the district court to pursue additional damages as permitted by Vermont law, including the intentional infliction of emotional pain and suffering (*Sheltra v. Smith* 392 A.2d 431, 433 (Vermont, 1978) and punitive damages (*Sparrow, Admr. v. Vermont Savings Bank*, 95 Vt. 29, 33 (1921).

Respectfully submitted,

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P.O. Box 220814
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314-849-4827

January 25, 2005

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obtained should in appropriate circumstances include affidavits from both experts and attorneys that affirm fraud is not present. (The Advisory Committee Notes of the revised Rule 702 refer to such affidavits.)

APPENDIX No.1

UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT
No. 03-CV-204

H. RICHARD AUSTIN, Plaintiff
v.
DOWNS, RACHLIN & MARTIN, HAROLD EATON, GREGORY CLAYTON, DOUGLAS G. PETERSON & ASSOC., STEPHEN HOUGHTON, and JIMMY PAU, Defendants

November 3, 2003, Decided

J. Garvan Murtha, District Judge

RULING ON DEFENDANTS' MOTIONS TO DISMISS
(Papers 17, 18, 19, and 20)

Plaintiff, H. Richard Austin, filed suit alleging that Defendants engaged in a conspiracy to defraud Plaintiff and this Court by fabricating scientific evidence in relation to Plaintiff's prior unsuccessful lawsuit. Defendants have filed separate Motions to Dismiss under Fed.R.Civ.P. 12(b)(6).

BACKGROUND

To put this case in context, one must go back to 1994 when Plaintiff filed his first lawsuit in this Court, *Austin v. The Hanover Insurance Company, et al*, Docket No. 95-cv-170, seeking insurance proceeds from Hanover after a fire destroyed his home (*Austin I*). Specifically listed on Plaintiff's Trial Memorandum as an issue for trial was the validity of Hanover's scientific evidence.

The case was tried to a jury, which ultimately decided that Hanover did not wrongfully deny insurance coverage to Plaintiff because the fire was caused by arson. Plaintiff appealed to the U.S. Court of Appeals for the Second Circuit which affirmed the judgment of the District Court. See Austin v. Hanover Ins. Co., 165 F.3d (2d Cir. 1998).

On September 2, 1999, Plaintiff filed a second action, Docket No. 99-cv-252, styled as a petition for relief from judgment (*Austin II*). In *Austin II*, Plaintiff alleged that Hanover engaged in a scheme to defraud by fabricating scientific evidence. The Court dismissed *Austin II*, ruling it was "clearly barred by res judicata." Once again Plaintiff appealed to the Second Circuit which affirmed in an unpublished mandate. See Austin v. Hanover Ins. Co., 14 F. Appx. 109, 110 (2d. Cir. 2001).

Now before the Court is Plaintiff's third attempt: a lawsuit against Defendants, all of whom were either attorneys or experts for Hanover. The issue is the same as that raised in the Trial Memorandum of *Austin I*, namely the validity of scientific evidence Hanover used to prove arson. In this third attempt, Plaintiff allleges that the attorneys and experts engaged in a conspiracy with Hanover to fabricate the scientific evidence.

Defendants have filed separate Motions to Dismiss arguing that the action is barred by res judicata and collateral estoppel. The Court agrees.

DISCUSSION

In deciding a Rule 12(b)(6) motion, a court must accept as true all of the allegations contained in the plaintiff's complaint and draw all reasonable inferences in his favor. See Burnette v. Carothers, 192 F. 3d 52, 56 (2d. Cir. 1999), cert. denied, 531 U.S. 1052 (2000). The complaint should not be dismissed unless it appears beyond all doubt that the plaintiff can prove no set of facts in support of his claims that would entitle him to relief. Id. When considering a motion to dismiss a pro se complaint, courts must construe the complaint liberally, Cruz v. Gomez, 202 F.3d 593, 597 (2d. Cir. 2000). Nonetheless, upon a review of the Complaint, it is clear that the doctrines of res judicata and collateral estoppel mandate dismissal of Plaintiff's suit.

I. Res Judicata or Claim Preclusion

Under the doctrine of res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. Flaherety v. Lang, 199 F.3d 607, 612 (2d Cir. 1999). Courts

have recognized that defendants who were not parties to earlier litigation may still invoke the doctrine of res judicata to bar relitigation of claims that a plaintiff asserted in prior proceedings resolved in a final judgment. See Nevada v. United States, 463 U.S. 110, 143 (1983). Here, Plaintiff raised the exact same fraud claim in prior proceedings which were resolved in a final judgment, and now he attempts to raise this same claim by substituting new defendants. Plaintiff cannot relitigate the same claim merely by substituting new, different defendants, in this case the attorneys and experts affiliated with the party he unsuccessfully sued in Austin I.

II. Collateral Estoppel or Issue Preclusion

Nonmutual collateral estoppel requires that the prior adverse decision bar Plaintiff from relitigating the previously decided issue against new defendants. See Blonder-Tongue Labs., Inc. v. Univer. of Ill. Found., 402 U.S. 313, 350 (1971). The Second Circuit enunciated a four-factor test for applying collateral estoppel:

1. the issues in both proceedings are identical;

2. the issue in the prior proceeding was litigated and decided;

3. there was a full and fair opportunity to litigate in the prior proceeding; and

4. the issue previously litigated was necessary to support a valid and final judgment on the merits.

United States v. Hussein, 178 F.3d 125, 129 (2d Cir. 1999).

Each factor appears to be met in this case: In *Austin I*, Plaintiff raised the issue of the validity of the scientific evidence used by Hanover; Plaintiff did not convince the fact-finder that the evidence was fabricated; he had ample opportunity to litigate the issue in *Austin I*; and the conclusion that the evidence was not fabricated was essential for finding in favor of Hanover. Thus, collateral estoppel prohibits Plaintiff from rechallenging the validity of scientific evidence that he challenged in *Austin I*.

CONCLUSION

For the reasons discussed herein, Defendants' Motions to Dismiss the Amended Complaint are GRANTED. SO ORDERED.

APPENDIX No.2

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 03-9264

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 4th day of November, Two thousand and four.

PRESENT:

HON. RALPH K. WINTER,
HON. ROBERT A. KATZMANN,
HON. REENA RAGGI,
Circuit Judges.

November 4, 2004, Decided.

H. RICHARD AUSTIN, *Plaintiff-Appellant*

v.

DOWNS, RACHLIN & MARTIN, Burlington, Vermont, HAROLD EATON, Eaton & Hayes, Woodstock, Vermont, GREGORY CLAYTON, Aten, Clayton & Eaton, Littleton , New Hampshire (formerly of Downs, Rachlin & Martin), DOUGLAS G. PETERSON & ASSOCIATES, Greenfield, Massachusetts, STEPHEN HOUGHTON, Douglas G. Peterson & Associates, Greenfield, Massachusetts, JIMMY PAU, Mercury Research Laboratory, Cary, North Carolina, *Defendants-Appellees*.

Appearing for Appellant: H. RICHARD AUSTIN, pro se, Kirkwood, Missouri
Appearing for Appellee Downs, Rachlin: ROBERT B. HEMLEY, Esq., Gravel & Shea, Burlington, VT
Appearing for Appellee Harold Eaton: ALLAN R. KEYES, Esq., Ryan Smith & Carbine, Rutland, VT
Appearing for Appellee Douglas Peterson: SHANNON A. BERTRAND, Esq., Reiber, Kenlan, Schwiebert, Hall & Facey, Rutland, VT

Appeal from the United States District Court for the District of Vermont (Murtha, J.).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the District Court is **AFFIRMED**.

H. Richard Austin, *pro se*, appeals from a judgment of the United States District Court for the District of Vermont (Murtha, J.), dismissing Austin's amended complaint as barred by the doctrines of *res judicata* and collateral estoppel. Familiarity with the facts is assumed. We need not go further than affirm the judgment of the district court on the basis of collateral estoppel.

Defendants present the argument that Austin's claims are barred by collateral estoppel. Under the doctrine of collateral

estoppel (issue preclusion), a plaintiff is prevented from relitigating in a subsequent proceeding an issue of fact or law that was fully and fairly litigated in a prior proceeding. See *Marvel Characters, Inc. v. Simon*, 310 F.3d 280, 288 (2d Cir. 2002). This Court has held that federal law on collateral estoppel applies to determine the preclusive effect of a prior federal judgment. See *Marvel Characters, Inc.* 310 at 286; *Gelb v. Royal Globe Ins. Co.*, 798 F.2d 38, 42 (2d Cir. 1986). Under federal law, collateral estoppel applies when: "1) the identical issue was raised in a previous proceeding; 2) the issue was actually litigated and decided in the previous proceeding; 3) the party had a full and fair opportunity to litigate the issue; and 4) the resolution of the issue was necessary to support a valid and final judgment on the merits. *Interoceanica Corp. v. Sound Pilots, Inc.* 107 F.3d 86, 91 (2d.Cir. 1997) (internal quotation marks omitted).

Under non-mutual collateral estoppel, if a litigant has had an opportunity to fully and fairly litigate an issue and lost, then third parties unrelated to the original action can bar the litigant from relitigating that same issue in a subsequent suit. See *United States v. Ustica*, 847 F. 2d 42, 49 n.14 (2d.Cir. 1988) See also *ACLI Gov't Sec., Inc. v. Rhoades*, 963 F. 2d 530, 533 (2d Cir. 1992) (citing *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 326-31 (1979) (the doctrine of mutuality, at least for defensive use of collateral estoppel, no longer applies); *Blonder-Tongue Lab., Inc. v. Univ. of Ill. Found.*, 402 313m 328-30 (1971) (strongly suggesting the mutuality requirement is no longer tenable) (parenthetical notations in the original). Accordingly, the question for this court is whether or not the issues of fraud and the validity of the scientific evidence were actually decided in *Austin v. Hanover Ins. Co.*, 165 F.3d 13 (2d.Cir 1998) (table opinion) ("*Austin I*").

There is considerable overlap between the issues previously litigated and resolved in the prior actions and those which Austin attempts to raise in the instant case. At issue in *Austin I* and in *Austin v. Hanover Ins. Co.*, 14 Fed. Appx. 109 (2d Cir. 2001)(unpublished opinion), was the validity of the scientific evidence that was present to the jury. Austin seeks to relitigate the

valdity of that evidence by styling the issues as fraud and fabrication of evidence. Austin has a full and fair opportunity to litigate these issues in *Austin I*, and the jury's determination that the evidence was not fabricated was necessary to support a finding in favor of the insurance companies. Thus, under the doctrine of non-mutual collateral estoppel, Austin was properly precluded from bringing the instant action.

For the foregoing reasons, we hold that the judgment of the district court is hereby AFFIRMED.

APPENDIX No.3

United States Court of Appeals
for the
Second Circuit

No. 99-9375

At a stated Term of the United States Court of Appeals for the Second Circuit at the United States Courthouse, Foley Square, in the City of New York, on the 4th day of May two thousand,
Present:

Hon. Thomas J. Meskill,
Hon. Jose A. Cabranes,
Hon. Robert A. Katzmann,
Circuit Judges

May 4, 2000. Decided

Richard Austin,
Plaintiff-Appellant,
v.
Hanover Insurance Company et al.,
Defendants-Appellees.

Motions have been filed by appellant, pro se, for a "reducton of excessive bond for costs," and by appellees for a motion to dismiss based on Appellant's failure to post the bond. Upon due consideration, it is ORDERED that the appellees' motion to dismiss is granted on the alternative basis that the appeal is frivolous for being barred by the doctrine of res judicata. See *Pillay v. I.N.S.*, 45 F.3d 14,17 (2d.Cir 1995)(this Court has the inherent authority to dismiss frivolous fee-paid appeals); *In re Teletronics Services, Inc.*, 762 F.2d 185, 190 (2d.Cir. 1985)(discussing the doctrine of res judicata). Appellant's motion is denied as moot.

FOR THE COURT: Roseann B. MacKechnie, Clerk

APPENDIX No. 4

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

00-9521

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 13th day of July, two thousand and one.

PRESENT: HON. DENNIS JACOBS,
HON. FRED I. PARKER,
HON. SONIA SOTOMAYOR,
Circuit Judges.

July 13, 2001. Decided.

RICHARD AUSTIN,
Plaintiff-appellant,
v.

HANOVER INSURANCE COMPANY, MASSACHUSETTS BAY INSURANCE COMPANY,
Defendants-appellees.

APPEARING FOR APPELLANT: H. Richard Austin, pro se
Kirkwood, MO

APPEARING FOR APPELLEE: Gregory S. Clayton, Aten, Clayton & Eaton, PLLC, Littleton, NH.

Appeal from the United States District court for the District of Vermont (Murtha, J.).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the United States District Court for the District of Vermont be, and it hereby is, AFFIRMED.

In August 1997, a jury rejected H. Richard Austin's claim for fire insurance. The defendants, insurance companies, presented evidence at trial that Austin had set fire to his own house. Austin's direct appeal to this Court was unsuccessful, and we dismissed his subsequent appeal brought under Fed. R. Civ. P. 60(b) on res judicata grounds. In this, his third trip to this court, Austin appeals from the district court's order denying his motions "to vacate fraudulent judgment and enter judgment with damages for plaintiff," pursuant to Rule 60(b)'s independent action savings clause and "for relief from order granting dismissal," pursuant to Rule 60(b) (2) and (3).

Austin re-allege his previous claims that the insurers engaged in "premeditated" fraud and committed fraud upon the court by conducting a bogus investigation, altering test results, and submitting false evidence to the court. Specifically, he argues that: 1) he has demonstrated "fraud upon the court" and therefore the judgment against him should not be enforced; 2) res judicata was inapplicable to his case since "different facts are now before the court: and the judgment against him was not on the merits since the defendants fraudulently withheld information from the jury; 3) the defendant insurers conceded fraud by failing to file a brief in response to Austin's petition for certiorari and are therefore estopped from denying it; 4) the defendants' motion to dismiss his **first Rule 60(b) motion** (emphasis added) was submitted in bad

faith since they failed to prove lack of fraud and incorrectly claimed that Austin had presented his claims of fraud at trial and in post-trial motions; and 5) the law of the case doctrine does not bar this Court from reconsidering its earlier decision -- to dismiss his appeal from **his first Rule 60(b) motion** (emphasis added) as frivolous -- particularly since this Court lacked the benefit of briefing on the res judicata issue. He seeks relief from the initial judgment, an award of monetary damages, and "reinstatement of claims for emotional suffering and punitive damages."

We review a district court's order granting or denying a motion for relief from a final judgment pursuant to Fed. R.Civ.P. 60(b) for abuse of discretion. See Transaero, Inc. v. La Fuerza Aerea Boliviana, 162 F.3d 724, 719 (2d.Cir. 1998). The district court did not abuse its discretion in denying the Rule 60(b) motions, because Austin failed to show newly discovered evidence, fraud or any other reason justifying relief under Rule 60(b). Austin's claim that the defendants waived any claims that they did not engage in fraudulent conduct when they failed to submit a brief to the Supreme court is meritless. See Sup. Ct. R. 15(1) and (2). Austin's claims of fraud are barred by res judicata as those claims were and could have been raised in the trial court or on direct appeal to this Court. See St. Pierre v. Dyer, 208 F.3d 394, 399 (2d. Cir.2000). And to the extent Austin challenges this court's dismissal of his appeal from the denial of **his first Rule 60(b) motion** (emphasis added), we find no "cogent or compelling reasons" to disturb our dismissal of his prior appeal. Rezzonico v. H&R Block, Inc., 182 F. 3d 144, 149 (2d.Cir. 1999)(citation omitted.

We have considered all of Austin's other arguments, and we find them to be without merit.

FOR THE COURT:
Roseann B. MacKechnie, Clerk of Court

APPENDIX No. 5

Excerpts from the sworn statement of
Mr. Jay Chrystal, Milford, New Hampshire

JAY CHRYSTAL

having been first duly sworn, was examined and testified as follows:

EXAMINATION

Q. (By Mr. Austin): Mr. Chrystal, how many years of experience do you have in the field of laboratory testing?

A. I started working in environmental testing in October of 1983, so that would put me at about 18 years this October.

Q. You are the owner and laboratory manager of ChemServe?

A. Yes, I am the owner, President and the Laboratory Director.

Q. What type of testing work do you perform at ChemServe?

A. We are a full-service environmental testing laboratory, so we offer organic environmental analyses, inorganic environmental analyses, bacteriological wet chemistry, so the whole gamut aside from radiologicals.

Q. Who certifies ChemServe to do this analytical testing.

A. We are in both certification programs and accreditation programs. One of the more flagship accreditation programs that we are currently in is the NELAC Program, which is the National Environmental Laboratory Accreditation Program. That is monitored. One of the accrediting authorities is the State of New Hampshire's Department of Environmental Services. So we are accredited through them, but we are also certified through all of the New England states.

Q. The National Environmental Laboratory Accreditation Conference, that is a program under the National Environmental Lab Accreditation Program?

A. Yes.....

Q. Specifically referring to the Hewlitt Packard chromatograph mass spectrometers or GCMS's, as they generally are referred to, how many years have you worked with Hewlitt Packard GCMS's?

A. I installed my first Hewlitt Packard GCMS in April of 1988, and

I have been working with them ever since.
Q. So 1988 to the present time, so roughly 13 years?
A. Yes.
Q. Now the GCMS includes the testing instrument or mass spectrometer and the data or computer system to which it is connected. Can you explain how those two components interact, including the role of the software?
A. The GCMS is comprised of a gas chromatograph and a mass spectrometer, which is the actual instrumentation that will acquire the data. This system is generally hooked up to some sort of computerized system that it gets all of its operating function from. So the computer is set up with software that is specifically designed to run the GC and the mass spectrometer, and it also is designed to acquire the data as the instrument is running. The software generally is something that is purchased to match up with the GCMS system that you are running, so if you are running a Hewlitt Packard system you will purchase Hewlitt Packard's software to run that system. It is an integrated system, where one does not run without the other.
Q. So I guess we can call the computer the brains of the operation.
A. Sure, in layman's terms that would work.
Q. Now, we have two exhibits, which are tests reports performed on a Hewlitt Packard GCMS. Exhibit A is dated November 25th 1993 hyphen 2:32 a.m. And Exhibit B. November 25th 1993 hyphen 4:00 a.m.
A. Correct.
Q. Do you have those Exhibits in front of you?
A. Yes, I do.
Q. Now, could you explain how the dates and times that I referred to were produced? In other words where did they originate from?
A. Those dates and times are what are called the acquisition time. The acquisition time is when the GCMS system specifically started running that particular sample. The place where it gets the time from the real-time clock, which is on the mother board of the computer. So the software is basically signifying that it is time to start running the sample. It looks at the real-time clock on the mother board of the computer and stamps that time into the codes

of the actual acquisition file.
Q. To speak more specifically about this internal clock, that clock is supported by a battery; is that correct?
A. That is correct.
Q. So the clock runs continuously 24 hours a day, 7 days a week; correct?
A. Correct.
Q. And this CMOS battery supports the clock even if the computer is turned off; is that right?
A. Yes, it is designed as a fairly reliable battery to keep the clock running in real-time in the background regardless of whether the computer itself is powered down or completely shut off.
Q. Now, these batteries are typically lithium, and they are capable of lasting for years; is that correct?
A. I believe an estimated lifetime for most CMOS batteries is up to ten years.
Q. What else does the battery sustain in addition to the clock?
A. It sustains all of the bios-settings for the computer itself. So, when a computer needs to go to the bios-settings to know what type of hard drive it has, and what type of other firmware and hardware has been configured for that particular computer. Without the CMOS, or if the CMOS battery were to be taken from the computer, then all those settings would be lost, and the computer would have to be reconfigured upon start-up.
Q. Now, looking again at Exhibit A and B, is it correct that these tests were performed on a H.P. Micro-Computer utilizing pascal software?
A. It looks to me that both of them have the distinctive integration of a pascal system. So if you look at the Exhibits, you will see that each peak has numbers at the top of it, many of them actually covering other numbers, so most of them are unreadable. This is fairly unique to the pascal system.
Q. So, in other words, the various characteristics that you have seen with pascal printouts, those are present here to you?
A. Yes.
Q. Now, at ChemServe you worked with Hewlitt Packard GCMS's employing pascal software for a number of years, so would it be

correct to say that you are familiar with pascal?
A. Yes. I am familiar with pascal.
Q. Because you actually worked with the pascal system?
A. Yes. We worked with a pascal system from when we first purchased our first GCMS system in 1988 until we upgraded to a DOS base system, which was in 1991, 1992.
Q. So that was a very substantial period of time that you worked roughly everyday with the pascal system?
A. Yes, at least on a weekly basis.
Q. Now, referring again to the internal clock that is supported by the battery, I think we have concluded that it is not necessary to set the date and time every time a GCMS, including its computer, is turned on, in that it had been previously turned off?
A. It is not necessary to set that clock. It will come up whatever real-time it has calculated in the background every time you turn the computer on, and it will continue to operate much like a regular watch will operate even when you are utilizing the computer with a clock running in the background.
Q. In other words, the clock continues to run, and even though you turned the machine off, there is a current date and time in there?
A. Correct....
Q. Okay. Now, if a statement has been made that it is necessary every time at the beginning of a test with a H.P. system to set the internal clock, that would be false and contrary to the way that microcomputers are designed and function; is that right?
A. Exactly. You don't generally set the clock at all while you are running it, it will acquire its own date and time from the real-time clock. So that statement is completely contrary to the way that this system works.
Q. Now, regarding Exhibits A and B, wouldn't it be correct that these two dates and times of November 25th 1993, 2:32 a.m., and November 25th 1993, 4:00 a.m., were automatically assigned by the computer and emanated from the continuously running internal clock and would in effect be the date and time when the tests were actually performed?
A. That is correct....
Q. Can you just briefly explain what the auto tune procedure is?

A. In order for the GCMS system to operate and function properly, you have to tune the instrument. One of the ways of initially tuning the instrument is to utilize the auto tune function, which is part of the H.P. software. What that does is that automatically goes in and adjusts different electrical functions and different pieces of hardware within the mass spectrometer to maximize its sensitivity., Once that auto tune is performed you would save that tune file, and that would be utilized when you are acquiring any data. You would place that tune file in your actual method, so when the computer and the GCMS system started running a sample the first thing it would do is go and set up these operating conditions that maximize the sensitivity through auto tune to keep that instrument within a tune.

Q. So, in other words, you would have had the computer on to perform the auto tune function?

A. Absolutely.....

CERTIFICATE

I, Carolann Crowley, a Certified Shorthand Reporter and Notary Public of the Commonwealth of Massachusetts, do hereby certify that the foregoing is a true and accurate transcript of my stenotype notes of the deposition of Jay Chrystal....

APPENDIX No. 6

Excerpts from the sworn statement of Dr. Donald Hesse, Saint Louis, Missouri

DR. DONALD HESSE

of lawful age, having been first duly sworn to testify the truth, the whole truth, and nothing but the truth in the case aforesaid, deposes and says in reply to oral interrogatories propounded as follows, to-wit:

EXAMINATION

QUESTIONS BY MR. AUSTIN

Q. Dr. Hesse, could you explain what field your Ph.D is in?

A. My Ph.D. is in organic chemistry... I was awarded the Ph.D. in 1990 from the University of Missouri in St. Louis.

Q. You have worked in the field of analytical chemistry and material identification for approximately 19 years?

A. That is correct.

Q. And for 14 years, you worked at various analytical laboratories in the St. Louis area?

A. Yes.

Q. And since approximately 1997, you've had your own consulting firm. Could you explain a little bit about your consulting business?

A. My consulting firm is Veritos Analytical Services, Incorporated...The company specializes in consulting with analytical laboratories analysis...

Q. Now, during this 19-year period, you have worked as both a chemist and at times you've written software for the material identification field?

A. Yes.

Q. And you just alluded to the fact that in addition to having your consulting business, you are the director of information services --

A. Systems, information systems.

Q. Information systems at the St. Louis Post-Dispatch, and just roughly your duties at the Post-Dispatch are what, what do they consist of?

A. I'm in charge of all the business systems at the Post-Dispatch,

which include the financial computer systems, circulation management systems and our advertising management systems.
Q. And that goes to computers and to software?
A. Yes.
Q. Okay. Now during the 19 years that you have been involved in the analytical chemistry field, you have worked regularly with Hewlett Packard gas chromatograph/mass spectrometers or GC/MS as they are generally referred to?
A. Yes.
Q. Now, you have also at times written software for some of this Hewlett Packard equipment?
A. Yes, when I was at the first, or when I first started working with the HP GC/MS, I wrote software on the HP chem station, Pascal chem station, for making that analysis, reporting of analysis more efficient. I also wrote software on the other HP GC/MS specs system that we had there.
Q. And currently, as part of your consulting business, you also do software?
A. Yes, yes, I have written one major software application and we have a second one in development, and then I also write custom programs for laboratories.
Q. Now, we have two exhibits as part of this deposition, they are chromatograms of tests produced on Hewlett Packard GC/MS. Exhibit A is dated November 25th, 1993, 2:30 a.m., and the Exhibit B is dated November 25th, 1993, 4:00 a.m.
A. Okay.
Q. And you have those in front of you?
A. One is actually 2:32 a.m., it looks like, but --
Q. 2:32 and 4:00 a.m.?
A. Yes.
Q. All right. Now, is it correct that these two tests were performed on a micro computer GC/MS system utilizing Pascal software?
A. These chromatograms and the reports bear all the resemblances of the standard reports that are produced by the HP Pascal chem station.
Q. In other words, they contain the characteristics that you would see in a --

A. Yes.
Q. -- report generated by Pascal?
A. Yes, they do.
Q. And we have just referred to the fact that for several years you've worked with Hewlett Packard GC/MS equipment that utilized Pascal software?
A. Yes.
Q. And also that you wrote the software for those Pascal systems?
A. Yes, I wrote on the Pascal chem station. I wrote software that produced reports and analyzed results, calculated results, for that system.
Q. Now, could you explain how the date and time, which is on the right-hand side of the reports, was entered by the computer into these two test results, Exhibit A and B, in other words where did the date and time originate?
A. When the instrument is going to start collection on an alga run, it reads the date and time from the computer system clock, and inserts that into the data file for the particular test run, and that time is the second that the sample is injected into the GC.
Q. Okay. So, it automatically takes the date and time from this clock. Now, this clock runs, am I correct, 24 hours a days and thereby maintains a current date and time?
A. Yes, the system, the clock is a running system clock, runs continuously, it is backed up by a battery a C-moss battery, and it is a fully functional computer clock.
Q. Now, because the internal clock is supported by the battery, it is not necessary to set the date and the time every time such a GC/MS including its computer is turned on in the event it was previously turned off, would that be correct?
A. That's correct, yes. It maintains the time across power turn off.
Q. Okay. Now, the statement that it is necessary every time at the beginning of a test to set the internal clock, wouldn't that be false and contrary to the way such micro computers are designed and functioned?
A. Yes, that would be false. It is not necessary to set the date and time before each analytical test run....
Q. ...Dr. Hesse, based on these two exhibits, you indicated that it

was your conclusion that the tests that had been performed on an HP GC/MS using Pascal employed what is called an auto sampler, could you explain how the auto sampler works and how that would relate to the date and time that's inserted in the test results?
A. I'm basing my assumption that an auto sampler was used because there's a bottle number on the analytical report and that bottle number changes between runs, and that indicates that an auto sampler was used on the instrument, and when there's an auto sampler present, the operator of the instrument will set up an analytical sequence using the Pascal chem station software, they would type in all the sample names that they plan on running. They will put those samples in the auto sampler, and they'll start the sequence, and then the computer system will automatically run all the samples without any further intervention from the analyst. Every time the sample of the instrument makes an analysis, at the moment it injects the sample into the instrument, it reads the system date and time off -- it reads the date and time off the system clock and inserts that into the data file and that's the injection time for this run...
Q. Now, the report that is at 2:32 a.m., that was from bottle --
A. Bottle 5.
Q. So, there would have been presumably four bottles previously?
A. Yes, presumably.
Q. And then the one dated 4:00 a.m. was from Bottle No. 7?
A. Yes.
Q. So then there was one in between there?
A. Yes.
Q. Now, once you stored a run like that on a series of bottles, the computer runs automatically and each time, at the moment the sample is injected, a date and time are obtained automatically from the internal clock?
A. Yes, they're obtained automatically
Q. Okay. And that doesn't require any intervention by the operator of the machine?
A. No. No. No intervention at all....

I, Margaret M. Clodius, a Notary Public in and for the State of Missouri, duly commissioned, qualified and authorized to administer oaths and to certify to depositions, do hereby certify that pursuant to Agreement in the civil cause now pending and undetermined in the United States District Court, District of Vermont, to be used in the trial of said cause in said court, I was attended at the offices of Dr. Donald Hesse, County of St. Louis, State of Missouri, by the aforesaid witness; and by the aforesaid attorneys; on the 23rd day of March, 2002.....said testimony being by me reported in shorthand and caused to be transcribed into typewriting, and that the foregoing pages correctly set forth the testimony of the aforementioned witness, together with the questions propounded by counsel and remarks and objections of counsel thereto, and is in all respects a full, true, correct and complete transcript of the questions propounded and the answers given by said witness....